Supreme Court, U. S.
FILED
OCT 24 1979
MICHAEL RODAK, JR., CLERK

79-667

CORRECTED COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. [redacted]

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner,

-vs-

ROBERTO ROSALES
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Robert L. Kaczmarek (P-15639)
Saginaw County Prosecutor
By: Linda Berns Wright (P-26621)
Chief Appellate Attorney
Saginaw County, Michigan
Court House
Saginaw, Michigan 48602
Telephone: (517) 790-5330

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	ii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF FACTS	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	6
APPENDIX "A" OPINION OF THE MICHIGAN COURT OF APPEALS	7
APPENDIX "B" OPINION OF THE MICHIGAN SUPREME COURT	15

INDEX OF AUTHORITIES

Cases: Page

Adams v *Williams*, 407 US 143;92 S. Ct. 1921; 32 L Ed 2d 612 (1972) 3, 4, 5

Rakas v *Illinois*, US 99 S. Ct. 421, 58 L Ed 2d 387 (1978) 4, 5, 6

Terry v *Ohio*, 392 US 1; 88 S.Ct. 1868; 20 L Ed2d 889 (1968) 2, 3, 4, 6

People v *Rosales*, 87 Mich App 185; 274 NW 2d 13 (1978) 1, 2, 3

People v *Rosales*, 406 Mich 624 NW2d (1979). 1

US Constitution:

US Constitution, AM. IV. 2

Other Authorities:

28 USC. Sec 1257 (3) 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner,

-VS-

ROBERTO ROSALES
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Now Comes ROBERT L. KACZMAREK, Prosecuting Attorney in and for the County of Saginaw, State of Michigan by LINDA BERNS WRIGHT, Chief Appellate Attorney and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan, entered in the above-entitled cause on July 25, 1979.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 87 Mich App 185; 274 NW2d 13 (1978), and is appended as Appendix "A". The opinion of the Michigan Supreme Court is reported at 406 Mich 624 NW2d (1979), and is appended as Appendix "B".

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on November 27, 1979. The judgment of the Michigan Supreme Court, reversing the Michigan Court of Appeals, was entered on July 25, 1979. The jurisdiction of this Court is invoked under 28 USC, Sec. 1257 (3)

QUESTION PRESENTED

Does *Terry* v *Ohio*, 392 US 1; 88 S. Ct. 1868; 20 L Ed 2d 889 (1968) preclude a protective search where, although the objective facts demonstrate a reason to believe a gun was present and readily available, the record does not contain a statement by the officer that he was in fear of violence and where the defendant denies that he is the owner of the vehicle and denies any knowledge of the gun.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

In 1976 Defendant Roberto Rosales was jury convicted of carrying a pistol in an auto and sentenced to a prison term of two to five years. On appeal, the Michigan Court of Appeals affirmed finding that the Defendant's actions and the circumstances justified the officer's protective search. *People* v *Rosales*, 87 Mich App 185; 274 NW2d 13 (1978).

In lieu of granting leave, the Michigan Supreme Court, in a four to three split opinion, reversed, the majority holding that *Terry* v *Ohio*, 392 US 1; 88 S. Ct. 1868; 20 L Ed 2d 889 (1968) did not extend to the instant case because "the record (did) not show that the search was prompted by the officer's fear of violence". *People* v *Rosales*, 87 Mich App 185; 274 NW 2d 13 (1978). The dissenting justices found *Adams* v *Williams*, 407 US 143; 92 S. Ct. 1921; 32 LEd 2d 612 (1972) applicable to the above facts and found that the officer's actions "were reasonable under the circumstances and constitutionally unobjectionable." Petitioner now seeks a writ of certiorari to review the judgment of the Michigan Supreme Court.

REASONS FOR GRANTING THE WRIT

The Michigan Court of Appeals held that the facts and circumstances of this case justified the officer's protective search:

> As in all search and seizures questions, the determination of whether the police acted within the boundaries of the Fourth Amendment must be based upon the specific facts presented. On the facts of this case, the police action was justified as a protective measure under the rationale of *Terry* v *Ohio*, 392 US 1; 88 S.Ct. 1868; 20 L Ed 2d 889 (1968), and *Adams* v *Williams*, 407 US 143; 92 S. Ct. 1921; 32 L Ed 2d 612 (1972).

The majority of the Michigan Supreme Court reversed because in their opinion, the record did not show that the search was prompted by the officer's fear of violence and therefore, under *Terry* v *Ohio, supra*, the search was impermissible. Petitioner submits that the decision of the Michigan Supreme Court is contrary to decisions of this Court, and that the misapplication was caused by the fact that the controlling cases have not been previously construed together by this court. Plenary review is necessary to clarify the law in this area.

In *Terry* v *Ohio*, *supra*, this Court held that the governmental interest in investigating crime must be considered along with the interest of the police officer in determining whether or not a person is armed. With this in mind, the nature and quality of the intrusion must also be considered. This Court went on to find that where an officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.

In *Adams* v *Williams*, *supra*, this Court, in applying the standards of *Terry* v *Ohio*, *supra*, found that the particular forcible stop was justified and went on to conclude that where the suspect was sitting alone in a high-crime area at 2:15 a.m., the officer had ample reason to fear for his safety. His decision to reach to the spot where he thought the gun was hidden was a reasonable, limited intrusion designed to insure his safety.

In *Rakas* v *Illinois*, U.S. 99 S. Ct. 421, 58 L Ed.2d 387 (1978) this Court held that Fourth Amendment rights are personal and where the defendants assert neither a property nor a possessory interest in the automobile, nor in the property seized, they had no legitimate expectation of privacy and they lacked standing to object to the alleged unlawful search and seizure. The Court was not concerned with the issue of probable cause in that case. This Court has yet to consider the case where a defendant alleges no property or possessory interest in the seized weapon at trial, thus denying standing and on appeal challenges the search and seizure, thus assuming standing.

In the instant case the gun was admitted into evidence because the trial court found that under the circumstances, the police were justified in searching the automobile. The Michigan Court of Appeals affirmed. The Michigan Supreme Court reversed, presumably because the record did not contain an affirmative indication that the officer had a fear of violence. The testimony revealed that the police officer approached an illegally parked vehicle at about 6:30 a.m. on

June 10, 1976. The vehicle was parked in front of an after-hours establishment and the passenger was a negro male. On roll call that day the officer received information that a male negro subject who was known to rob after-hours establishments and who had been arrested and charged with armed robbery, had escaped from the hospital. The officer was working alone when he observed the vehicle and the vehicle was parked in a high crime area in the City of Saginaw. The officer parked his car and approached the vehicle. He looked directly at Defendant Rosales and observed a surprised look on his face. The Defendant leaned forward and to the right, as if he was concealing something. The officer had unsnapped his service revolver and was ready to use it if necessary. The officer asked the Defendant to step from the vehicle and go stand by the other officers who had arrived as a backup. The officer looked at the area where he had seen the Defendant lean forward. He noticed that the carpeting was humped in this area. He lifted the carpet and found a loaded pistol with the hammer cocked. That was the extent of the search. The Defendant testified that the search lasted maybe twenty seconds. At trial, the Defendant testified that the van was not his, that he borrowed it from his brother, and that he had no idea that the gun was in the vehicle before the police discovered it.

The facts of the instant case support the reasonableness of the officer's decision to search the van. The limited nature of the search further supports the conclusion that the search was for the officer's own safety. A forcible stop was not necessary in this case, the vehicle was illegally parked. The officer's decision to investigate was reasonable. The officer's decision to search for the gun was reasonable. As in *Adams* v *Williams*, *supra*, the officer had ample reason to fear for his safety and the limited search of the area where he thought the gun was hidden was lawful.

Thus, admission of the evidence at Defendant's trial was proper. However, Defendant's change in strategy on appeal raises the issue of the applicability of *Rakas* v *Illinois*, *supra*. Unlike that decision, the instant case has directly questioned

the circumstances of the search. Under this situation, what are the parameters of *Rakas* v *Illinois*, *supra?* The Defendant in the instant case desires to argue both sides of the coin at once, denying standing, but questioning the search.

Petitioner submits that the holding of the Michigan Supreme Court is contrary to the decisions of this Court and in effect permits a defendant to change strategies at the appellate level. Based on *Terry* v *Ohio*, *Adams* v *Williams* and *Rakas* v *Illinois*, the Michigan Supreme Court should be reversed.

CONCLUSION

WHEREFORE, petitioner submits that the Michigan Supreme Court has misconstrued decisions of this Court, resulting in a substantial federal question such that plenary review should be granted.

Respectfully submitted,

(s) Robert L. Kaczmarek (P-15639)
Prosecuting Attorney
Saginaw County, Michigan
Court House
Saginaw, Michigan

(s) Linda Berns Wright (P-26621)
Chief Appellate Attorney
Saginaw County, Michigan
Court House
Saginaw, Michigan

Dated this 17th day of October, A.D., 1979

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs- No. 77-362

ROBERTO ROSALES, November 27, 1978
Defendant-Appellant.

BEFORE: Holbrook, Jr., P.J., T. M. Burns and VanValkenburg, JJ. T.M. Burns, J.

Defendant was convicted after a jury trial for carrying a pistol in a motor vehicle, MCL 750.227; MSA 28.424, and sentenced to serve two to five years in prison. Defendant made several attempts both before and during the trial to have the pistol suppressed as the product of an illegal search and seizure under the Fourth Amendment. The only issue raised on appeal relates to the seizure of the pistol.

As in all search and seizure questions, the determination of whether the police acted within the boundaries of the Fourth Amendment must be based upon the specific facts presented. On the facts of this case, the police action was justified as a protective measure under the rationale of *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) and *Adams* v *Williams*, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972).

In the early morning hours of June 10, 1976, a Saginaw police officer, alone in his patrol car, noticed a van parked beyond the curb, blocking the entrance doors to a building. The officer knew that an illegal "after hours" establishment

was being run in this building. At roll call that morning, the officer had been told that a young black man who had been arrested for the armed robbery of similar after hours establishments had escaped from the hospital. The officer also knew that this area was noted for the high incidence of crime.

Defendant was seated in the driver's seat of the van and a young black man was in the passenger seat. The officer knew the escaped suspect's name, but had only a general description which would fit many citizens of Saginaw, including the individual seated in defendant's van. Still, given the proximity to the "after hours" establishment, the officer decided to investigate the identity and purpose of the two individuals.[1] Other officers were notified of this intention by radio.

The officer circled the block and pulled behind and to the side of the van. He was able to begin his approach to the van unnoticed by the occupants. When he did notice the officer, defendant's eyes widened, as if surprised, and he made a quick movement down and forward, as if he were placing something between and to the rear of the seat. The officer immediately ordered defendant out of the van.

Defendant alighted from the van when ordered to do so and went to stand with another officer who had just arrived. At this point, the first officer could see a bulge in the carpet covering the floor of the van[2] in the area into which defendant had just reached. The officer reached into the area

[1] Defendant does admit that the fact of proximity to the after hours establishment *may* have given the officer reason to make an investigative stop. Given the circumstances detailed in the text, it seems clear that the officer's choice to approach the van was reasonable under the Fourth Amendment. The problem lies only with his response after he began to approach the van.

[2] The van was used in a business and contained only the two front bucket seats. The carpeting from the front area of the van met the carpeting from the back and overlapped slightly. The seam of the overlap ran from door to door rather than down the middle of the van. The buldge observed by the officer before he reached into the van was directly under this area of overlap.

and removed a .38 caliber Colt semi-automatic pistol fully loaded, cocked and ready to fire. Defendant's companion, who had remained in the van up to this point and was within reaching distance of the bulge in the carpet, was then removed and a search revealed that he had a loaded revolver in his waistband.

Under the circumstances just described, the officer's decision to order defendant out of the van, see *Pennsylvania* v *Mimms*, US ; 98 S Ct 330; 54 L Ed 2d 331 (1977), and investigate the area into which he had just reached can be justified as a protective search or limited intrusion for his own safety. As the majority noted in *Adams* v *Williams*, *supra*, "the Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." 407 US at 145.

The officer was faced with two individuals in a high crime area under circumstances which led him to conclude that an impending robbery at the after hours joint was more than a mere possibility. When defendant saw the officer and made the move noted above, the officer believed defendant was hiding a weapon. The intrusion was limited to removing defendant from the van and checking this area to either confirm or immediately dispel his belief that defendant was armed.

It must be admitted that the officer did not, before discovery of the pistol, have probable cause either to arrest defendant or undertake a full scale search of the van. But, neither of those events occurred until after the first pistol was discovered. That first pistol, the one upon which this prosecution is based, was discovered in a limited protective search. Just as the officer in *Adams*, who did not have probable cause to search the defendant, was justified by the surrounding circumstances in checking the spot he believed a gun was hidden, 407 US at 148, so the officer in this case was justified in his limited intrusive act. An officer's

"suspicion" or conclusion based on his experience is entitled to some weight in our Fourth Amendment analysis. *People* v *Ridgeway*, 74 Mich App 306, 314; 253 NW2d 743 (1977), *lv den'd* 401 Mich 831 (1977). The officer testified that he was sure defendant had a gun.

This case has certain similarities to *People* v *Robertson*, 81 Mich App 446; NW2d (1978), recently decided by this Court. In each case the seizure of a weapon from an area of a vehicle, not a person, can be justified under the self-protection for officers rationale of *Terry* and *Adams*, in each the area to be checked is drawn to the officer's attention by a "furtive gesture" of one of the occupants of the vehicle. In each, the "furtive gesture" does not stand alone but is coupled with other factors indicating criminal behavior and giving a basis for the officer's suspicion that a weapon had been hidden in a particular location in the vehicle.

It is the surrounding facts and circumstances, and the fact that the officer is looking for a gun, as opposed to drugs or other contraband, which distinguishes these cases from many of the other so called "furtive gesture" cases where a full search, dependent on probable cause, is involved. While this writer joined in suppressing evidence of a controlled substance seized in *People* v *Strong*, 77 Mich App 281; 258 NW2d 205 (1977) where the occupants made a movement in a van very similar to the movement here and would have suppressed marijuana evidence where the defendant did nothing more than drop a jacket over two clear vials in *People* v *Hall*, 40 Mich 329, 340; 198 NW2d 762 (1972) (T. M. Burns, Dissenting), in neither of those cases did the surrounding circumstances give the officer reason to believe that his own safety may be in danger. There is a vast difference between what an officer may expect to be confronted with in a campground, *Strong*, *supra*, or on an expressway in VanBuren County, *Hall*, *supra*, as compared to downtown Saginaw in the early morning. These differences in the surrounding circumstances justify a different police response. Actions and circumstances which

may justify an officer's protective search for weapons would not justify the same intrusion where the officer had no reason to suspect a weapon's presence.

The trial court was correct in refusing to suppress the pistol in this case.

Affirmed.

BEFORE: Holbrook, Jr., P.J., T.M. Burns and VanValkenburg, JJ D.E. HOLBROOK, JR., J (Concurring)

I concur for the reason that the officer in the instant case believed defendant was hiding a weapon.

In *People* v *Robertson*, 81 Mich App 446, 265 NW2d 365 (1978), a case in which I dissented, the officer had no idea what the "dark colored object" was. Hence, in that case, I concluded that the search could not be characterized as a "protective" search. The facts in the case at bar being different, the search can be so characterized and justified.

APPENDIX B

NOTE: Where possible, a syllabus (headnote) such as this will be released at the time the opinion is released. This syllabus is *not* a part of the opinion of the Court but has been written by the Supreme Court Reported as a summary of the case for the convenience of readers. See *United States* v *Detroit Lumber Co*, 200 US 321, 337; 26 S Ct 282; 50 L Ed 499 (1906).

PEOPLE v ROSALES

Docket No. 62398. Decided July 25, 1979. On application by the defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgments of the Court of Appeals and the circuit court.

Roberto Rosales was convicted by a jury in Saginaw Circuit Court, Eugene Snow Huff, J., of carrying a pistol in a motor vehicle. The defendant had moved to suppress the weapon as the product of an illegal search of a van parked in a "no-parking" zone, and the motion had been denied. The Court of Appeals, T. M. Burns and Van Valkenburg, JJ. (D. E. Holbrook, Jr., P.J., concurring specially), affirmed (Docket No. 77-362). Defendant applies for leave to appeal. In a per curiam opinion signed by Justices Kavanagh, Levin, Ryan, and Moody it was *held:*

A protective search of a person by the police is permitted during an investigatory stop to mitigate risks to police officers performing their duties. Further detention or search must be based on consent or probable cause. The people do not suggest that there was consent or probable cause for the search in this case. While the police must be free to investigate without fear of violence, there is nothing in the record to suggest that the police officer searched the van for that purpose.

The judgments of the Court of Appeals and the circuit court are reversed, and the case is remanded to the Saginaw Circuit Court for entry of an order to supress the pistol as evidence.

Justice Williams, joined by Chief Justice Coleman and Justice Fitzgerald, dissenting, would hold that the limited search in this case surmounts the Fourth Amendment challenge.

1. The Supreme Court of the United States has recognized that a police officer may in appropriate circumstances and in an appropriate manner approach a person to investigate possibly criminal behavior even though there is no probable cause to make an arrest. The police officer, based upon specific experience and observations, may conduct a limited search for weapons if the police officer has reason to believe that criminal activity is involved and that the persons with whom he is dealing may be armed and dangerous. The focus of the Supreme Court of the United States in permitting such a limited search has consistently been the police officer's interest in assuring that his safety is not compromised where there is present in the searched area a suspect who may be armed with a weapon.

2. The police officer making such an investigatory stop may act upon specific reasonable inferences which he is entitled to draw from the facts in light of his experience. In this case the defendant has conceded that the fact of the van's proximity to an "after-hours" drinking establishment *may* have given the police officer reason to make an investigative stop. The police officer who confronted the defendant acted from personal observation coupled with knowledge obtained through his familiarity with the neighborhood of his patrol. The police officer's actions in this instance, approaching the van, requesting the driver to get out of it, and limiting his search to the area into which the defendant had furtively reached as the police officer approached and where he

could see a bulge in the carpet which he believed to be a gun, were reasonable under the circumstances and constitutionally unobjectionable.

87 Mich App 185; 274 NW2d 13 (1978) reversed.

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

-vs-

ROBERTO ROSALES,
Defendant-Appellant.

CR 25-146
62398

July 25, 1979

Per Curiam. The question before us is how far the permissible stop-and-frisk of *Terry* v *Ohio*[1] extends in an automobile context. When the record does not show that the search was prompted by the officer's fear of violence while pursuing his investigation, *Terry* v *Ohio* does not provide authority to validate the search without a warrant.

I.

At roll call for his shift on June 10, 1976, Saginaw police officer Herzberg was told that a young black man, who had been arrested for the armed robbery of "after hours" drinking establishments in Saginaw, had escaped from the hospital where he apparently was receiving treatment. The individual was described only as being 5 feet 8 inches tall with a dark complexion.

Later that same morning (approximately 6:30 a.m.) Herzberg noticed a van parked in a prohibited zone by the entrance to a building. Herzberg testified that he knew that an "after hours" drinking establishment was being run in this building. Herzberg noted that the defendant was seated

[1] 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

in the driver's seat of the van and a young black man[2] was in the passenger seat.

He circled the block and pulled behind and to the side of the van. He decided to investigate further and radioed other officers of his intention to do so. His approach to the van went unnoticed by the occupants. As the officer approached the van, the defendant bent slightly forward, leaning to the right, and "* * * you could see that something was going on in the middle section of where his body was".

Hertzberg asked the defendant to identify himself and to step out of the van. The defendant did get out of the van and Herzberg told him to go back and stand by a backup unit which had by then arrived. Herzberg then looked inside the van and saw a "lump" where two pieces of carpeting came together.[3] He lifted the carpeting and found a pistol.

The defendant was charged with carrying a pistol in an automobile.[4]

II.

The defendant filed a motion to suppress the weapon seized; he alleged its seizure was the product of an illegal search. At the hearing on the motion, Herzberg explained his action as follows:

Q. Well, why were you going to check the van?
A. Because of the circumstances of being parked in front of the after-hours joint, the movements that he had made and the male Negro subject in the van with him.
Q. All right. What did you do then?
A. After he had made his movements and stepped from

[2] The black man in the van was not in fact the one sought.

[3] Contrast *Pennsylvania* v *Mimms*, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977), where the police noticed the "bulge" on defendant's person once he emerged from a vehicle.

[4] MCL 750.227; MSA 28.424.

the van, in my own mind, I was sure there was something there.
Q. What did you think was there?
A. A gun.
Q. And why did you think that there was a gun there?
A. As far as I could see, that's all it could have been.
Q. What factors did you base your belief that you—or your feeling that there was a weapon inside of the van at that time? What were the factors?
A. It would be the simple fact that they were parked illegally in front of the after-hours joint, blocking, a clear obstruction in and out, and the movements that he made and the information that we had regarding these places that were being robbed.
Q. All right, and what did you do when you looked inside the van? What did you find?
A. I could see the carpeting was separated and there was a lump there, where the two pieces of carpeting had come together. One would be underneath and the other would overlap. The hump was pushed up.
Q. Could you see the hump before you did anything with the carpet?
A. Yes.

* * *

Q. What did you do after that?
A. I lifted the piece of carpeting up and looked underneath it.
Q. What did you find?
A. A pistol.

* * *

Q. Was it unloaded?
A. No.
Q. Was it ready to fire?
A. Yes.
Q. What did you do after you found the weapon?
A. The weapon, when I found it, had the hammer cocked. Simply by depressing the trigger it would have fired

so I dropped the clip out and racked the chamber. There was a live round in the chamber."

In denying the motion, the trial judge said in part:

"* * * it would appear that the evidence in this case clearly warrants the police action. He was acting on information which made him suspicious of the vehicle being parked at the place that it was, with the companion that the defendant had with him.

"This, combined with the defendant's own motions in apparently trying to hide something, caused the officer very properly to take the steps he did to search the vehicle and to disarm the defendant."

The Court of Appeals affirmed.[5]

III.

Terry v *Ohio* permits a protective search of the person during an investigatory stop in order to militate against unnecessary risks to police officers performing their duties. Further detention or search must be based on consent or probable cause.[6] The people do not suggest there was consent or probable cause in this case. While the police must be free to investigate without fear of violence,[7] there is nothing in this record to suggest that Herzberg searched the van for that purpose.[8]

---

[5] 87 Mich App 185; 274 NW2d 13 (1978).

[6] See *United States* v *Brignoni-Ponce*, 422 US 873, 882; 95 S Ct 2574; 45 L Ed 2d 607 (1975), and *United States* v *Ortiz*, 422 US 891, 896; 95 S Ct 2585; 45 L Ed 2d 623 (1975). Contrast *People* v *Damaska*, 404 Mich 391; 273 NW2d 58 (1978), where we found probable cause for the police to proceed with a vehicle search after an investigatory stop.

[7] See *Adams* v *Williams*, 407 US 143, 146; 92 S Ct 1921; 32 L Ed 2d 612 (1972).

[8] We need not decide, consequently, whether the *Terry* protective search may extend from the person to the vehicle a person has exited. See, *e.g.*, *Government of the Canal Zone* v *Bender*, 573 F2d 1329 (CA 5, 1978), limiting *Terry* under similar circumstances.

In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgments of the Court of Appeals and the circuit court and remand the case to the Saginaw Circuit Court for entry of an order consistent with this opinion.

(s) BLAIR MOODY, JR.
(s) CHARLES L. LEVIN
(s) THOMAS GILES KAVANAGH
(s) JAMES L. RYAN

WILLIAMS, J. [Dissenting]

The question for decision is whether a police officer may conduct a limited search of a van for the officer's own safety, when he witnesses furtive movements by the driver which lead the officer to believe that a gun is being concealed therein, when the van is observed illegally parked in front of a known "afterhours" drinking establishment, and contains a passenger who matches the description of an escapee who had been arrested for robbing such establishments, as well as the driver. If the officer may do so, then pursuant to the teachings of *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and its progeny, the fruits of the search may be admissible in evidence. The trial court was correct in refusing to suppress the pistol, and defendant's conviction should be affirmed.

I.

The full facts are adequately stated in the majority opinion.

II.

In *Terry* v *Ohio*, *supra*, the United States Supreme Court recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even

though there is no probable cause to make an arrest". *Id.*, 22. *Terry* held further that a police officer, based upon experience and observations, may conduct a limited search for weapons if he or she has reason to believe that "criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous * * *". *Id.*, 30. Without the necessity of probable cause to arrest or search, the officer may act upon "specific reasonable inferences which he is entitled to draw from the facts in light of his experience". *Id.*, 27. In the instant case, as characterized by the Court of Appeals, defendant conceded that "the fact of proximity to the after hours establishment *may* have given the officer reason to make an investigative stop". *People* v *Rosales*, 87 Mich App 185, 188, fn 1; 274 NW2d 13 (1978).

The initial extrapolation from *Terry* occurred in *Adams* v *Williams*, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972), which upheld the seizure of a pistol from a person in a parked car. The police officer in that case was patrolling a high-crime area in the early morning hours. Acting pursuant to an informant's tip that the defendant-occupant of an automobile possessed narcotics and a weapon concealed in his waistband, the officer approached the vehicle and asked the defendant to step out. When the suspect lowered the window rather than heeding the officer's command, the officer reached into the automobile and removed a fully loaded gun from the defendant's waistband. The gun had not been visible from outside the vehicle. In upholding the admissibility of the seized weapon, the *Adams* Court ruled that, despite the absence of probable cause, a police officer should not simply "shrug his shoulders and allow a crime to occur or a criminal to escape". *Id.*, 145. Noting that the officer had reason to fear for his safety in light of both the area in which the defendant was discovered, as well as the time at which the incident took place, the *Adams* Court held that the officer's actions were "a limited intrusion designed to insure his safety" and that the weapon seized was properly admitted at trial. *Id.*, 147-148.

III.

Adams is persuasive authority for the proposition that the instant limited search surmounts a Fourth Amendment "unreasonable search and seizure" challenge. Const 1963, art 1, § [illegible]. The police officer who confronted defendant-appellant acted from personal observation coupled with knowledge obtained through his familiarity with the neighborhood of his patrol: he noted that the defendant's van was illegally parked in front of an afterhours drinking establishment, and he had received a description of an escapee, who had been arrested for robbing such establishments, which matched the physical features of the van's passenger. In addition, the officer observed the defendant quickly reach into a carpeted area immediately between the seats, before being challenged. Upon the defendant's exit from the van, the officer was able to see a bulge in this carpeted area. When the driver stepped out of the van, the suspected escapee remained inside, presumably with ready access to the object which the driver had placed under the carpeting. The officer testified at the weapon suppression hearing that he believed the object beneath the carpeting to be a gun. Wary as a result of these furtive motions, and sighting the tell-tale bulge, the officer's belief that the defendant was concealing a weapon was certainly reasonable.

IV.

In short, the focus of the Court has consistently been the police officer's interest in assuring that his or her safety is not compromised where there is present in the searched area a suspect who may be armed with a weapon. Consequently, the officer's actions in this instance—approaching the van, requesting the driver to exit, and limiting his search to the area into which defendant had furtively reached as the officer approached and where a bulge appeared—were reasonable under the circumstances and constitutionally unobjectionable.

The trial court was correct in refusing to suppress the pistol in this case, and defendant's conviction should be affirmed.

(s) G. MENNEN WILLIAMS
(s) JOHN W. FITZGERALD
(s) MARY S. COLEMAN